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Travis J. Parry

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EXAMINER

HOMAYOUNMEHR, FARID

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte TRAVIS J. PARRY

Appeal 2008-4505
Application 10/091,740
Technology Center 2400

Decided:¹ April 30, 2009

Before JOSEPH L. DIXON, ST. JOHN COURTENAY III, and
THU A. DANG, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 CFR § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Data (electronic delivery).

This is a decision on appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1, 2, 4-14, 17-30, 33-35, 37, and 39-41. Claims 3, 15, 16, 31, 32, 36 and 38 are cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

THE INVENTION

The disclosed invention relates in general to data communication. More particularly, the present invention relates to transmitting data across firewalls. (Spec. 1, ll. 4-6).

Independent claim 1 is illustrative:

1. A method of transmitting data across a firewall, the method comprising:

receiving a request to transmit data to a destination at a remote network;

searching for a firewall associated with the destination at the remote network, the firewall being configured to prohibit communication to the destination via a primary communication protocol and allow communication to the destination via a secondary communication protocol;

if the firewall is detected, automatically configuring the data for communication with the secondary communication protocol; and

transmitting the data to the destination by utilizing the secondary communication protocol, wherein the request to transmit the data to the destination comprises a primary address of the destination related to the primary communication

protocol and a secondary address of the destination related to the secondary communication protocol.

THE REFERENCE

The Examiner relies upon the following reference as evidence in support of the anticipation rejection:

Schwartz US 2002/0199114 A1 Dec. 26, 2002

THE REJECTION

1. The Examiner rejected claims 1, 2, 4-14, 17-30, 33-35, 37, and 39-41 under 35 U.S.C. § 102(e), as being anticipated by Schwartz.

FINDINGS OF FACT

In our analysis *infra*, we rely on the following findings of fact (FF) that are supported by a preponderance of the evidence:

Schwartz

1. Schwartz discloses that a device tries to open a TCP connection to a prespecified port at a given address. (Para. [0028]).
2. Schwartz discloses attempting to open a connection by using a first address and different protocols (i.e., TCP, HTTP, HTTP proxy). (See para. [0029]).
3. Schwartz discloses that if the first address and series of protocols are not successful in establishing a connection, then the next time the device will select the most likely address and port, if there are

any address ports remaining. Then the device will try the most likely used port and try the process again until there are no ports remaining (See para. [0032]).

4. Schwartz discloses that the non-traditional devices attempt to build a database of addresses and ports for the local firewall (See para. 33-34). Once the database is built the device will select the most likely address and port from the database. (Para. [0033]).

APPELLANT'S CONTENTIONS

1. Appellant contends that Schwartz fails to disclose the limitation of transmitting the data to the destination by utilizing the secondary communication protocol, *wherein the request to transmit the data to the destination comprises a primary address of the destination related to the primary communication protocol and a secondary address of the destination related to the secondary communication protocol.* (App. Br. 10).

2. Appellant contends that Schwartz teaches that the non-traditional devices 314-N attempt to build a database of addresses and ports for the local firewall 311 by sniffing local network traffic. This is because Schwartz is focused on a local client device attempting to find a port of a local firewall that allows the client device to communicate with remote devices. (App. Br. 11).

EXAMINER'S FINDINGS

The Examiner contends that Schwartz first tries a protocol, and if an address and/or port do not yield a successful connection, then the device

tries another address. Therefore, Schwartz tries a first address and then another address associated with the destination device. (Ans. 24).

ISSUE

Based upon our review of the administrative record, we have determined that the following issue is dispositive in this appeal:

Has Appellant shown that the Examiner erred in determining Schwartz discloses the request to transmit the data to the destination comprises a primary address of the destination related to the primary communication protocol and a secondary address of the destination related to the secondary communication protocol?

PRINCIPLES OF LAW

“[T]he examiner bears the initial burden on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability. If that burden is met, the burden of coming forward with evidence or argument shifts to the applicant.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

Therefore, we look to Appellant’s Briefs to show error in the proffered *prima facie* case.

“Anticipation requires the presence in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim.” *Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1458 (Fed. Cir. 1984).

For a prior art reference to anticipate in terms of 35 U.S.C. § 102, every element of the claimed invention must be identically shown in a single reference. However, this is not an “*ipsissimis verbis*” test. *In re Bond*, 910 F.2d 831, 832 (Fed. Cir. 1990).

ANALYSIS

As noted above, Appellant contends that the cited Schwartz reference fails to disclose the limitation of the request to transmit the data to the destination comprises a primary address of the destination related to the primary communication protocol and a secondary address of the destination related to the secondary communication protocol.

At the outset, we construe the plain language of claim 1 as requiring a request that includes a primary address, a primary protocol, *and* a secondary address with a secondary protocol, that *are all included within the same request*.

As noted above, Schwartz discloses that a device attempts a connection by using a first address with a first protocol, for example TCP, and then using different protocols (HTTP, and HTTP with a proxy) along with the first address. If none of these three combinations is successful, *then* another address is tried. (FF 1-3). Thus, we find that according to Schwartz, the “request” includes a primary address and several protocols, but does *not* include a secondary address (even though a secondary address may be later tried if the previous request to establish a connection is unsuccessful). Instead, Schwartz builds a database of addresses and ports that are the most likely to be successful. (FF 4).

Therefore, the evidence before us supports Appellant's contention as argued in the Briefs. We note that "absence from the reference of any claimed element negates anticipation." *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1571 (Fed. Cir. 1986).

Based on the record before us, we find that Appellant has shown the Examiner erred in determining that Schwartz discloses a request that includes a primary address and primary protocol, *and* a secondary address and secondary protocol (*See* Claim 1).

We further note that each of independent claims 1, 14, 29, and 35 similarly recite the limitation of the request to transmit the data to the destination comprises a primary address of the destination related to the primary communication protocol and a secondary address of the destination related to the secondary communication protocol. Thus, we find that Appellant has shown the Examiner erred in rejecting independent claims 14, 29, and 35 for the same reasons discussed *supra* regarding claim 1.

Accordingly, we reverse the Examiner's rejection of independent claims 1, 14, 29, and 35, and dependent claims 2, 4-13, 17-28, 30, 33-34, 37, and 39-41, as being anticipated by Schwartz.

CONCLUSION

Based on the findings of facts and analysis above, we conclude the following:

Appellant has shown that the Examiner erred in determining that Schwartz discloses the request to transmit the data to the destination comprises a primary address of the destination related to the primary

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communication protocol and a secondary address of the destination related to the secondary communication protocol.

DECISION

The decision of the Examiner rejecting 1, 2, 4-14, 17-30, 33-35, 37, and 39-41 under 35 U.S.C. § 102(e) is reversed.

REVERSED

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